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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

ELLIS GREGORY, JR. AND ANTHONY P. NUGENT, JR.,
Petitioners,

v.

JOHN D. ASHCROFT, GOVERNOR OF THE STATE OF MISSOURI,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF OF THE NATIONAL GOVERNORS' ASSOCIATION, COUNCIL OF STATE GOVERNMENTS, NATIONAL CONFERENCE OF STATE LEGISLATURES, NATIONAL ASSOCIATION OF COUNTIES, INTERNATIONAL CITY MANAGEMENT ASSOCIATION, AND NATIONAL LEAGUE OF CITIES AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Constitutional principles of federalism substantially limit the federal government's right to dictate to the States the terms for selection and retention of persons in core state governmental offices. The question presented is

I.

Whether, in light of these principles, the exemptions in the Age Discrimination in Employment Act for persons "elected to public office in any State" or "appointee[s] on the policymaking level" should be construed to encompass petitioners, who are Missouri judges and hence holders of Missouri core governmental offices? *

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* Although *amici* will not separately address petitioners' equal protection arguments, *amici* do not believe that the equal protection clause of the Fourteenth Amendment prevents the State of Missouri from requiring that its judges retire at the age of seventy years. *See infra* at 17 n.18.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
INTEREST OF THE *AMICI CURIAE*	1
SUMMARY OF ARGUMENT	2
ARGUMENT	4
I. PETITIONERS ARE EXEMPT FROM ADEA'S COVERAGE BECAUSE THEY ARE (A) PERSONS "ELECTED TO PUBLIC OFFICE" OF THE STATE OF MISSOURI AND (B) "APPOINTEES ON THE POLICYMAKING LEVEL" WITHIN THE MEANING OF SECTION 630(f)	4
A. Petitioners Are Exempt From Coverage Under ADEA Because They Are Elected To A Public Office of the State of Missouri	4
B. Petitioners Are Exempt From Coverage Under ADEA Because They Are Appointees On The Policymaking Level of Missouri's Government	6
II. THIS COURT SHOULD CONSTRUE SECTION 630(f) OF THE ADEA TO ENCOMPASS PETITIONERS BECAUSE A CONTRARY INTERPRETATION WOULD SUBSTANTIALLY UNDERMINE IMPORTANT PRINCIPLES OF FEDERALISM WHICH LIMIT FEDERAL POWER TO DICTATE RULES FOR THE SELECTION AND RETENTION OF A STATE'S JUDICIARY	11
CONCLUSION	21

TABLE OF AUTHORITIES

CASES — Page

Apkin v. Treasurer & Receiver General, 401 Mass. 427, 517 N.E.2d 141 (1988) 19, 20
Arcadia, Ohio v. Ohio Power Co., 111 S.Ct. 415 (1990) 4
Atascadero State Hosp. v. Scanlon, 473 U.S. 234 (1985) 6, 15
Baltimore & Co. v. Baugh, 149 U.S. 368 (1893) 14
Bates v. State Bar of Arizona, 433 U.S. 350 (1977) 12
Coyle v. Oklahoma, 221 U.S. 559 (1911) 14, 20
EEOC v. County of Calumet, 686 F.2d 1249 (7th Cir. 1982) 13
EEOC v. Massachusetts, 858 F.2d 52 (1st Cir. 1988) ..... *passim*
EEOC v. New York, 907 F.2d 316 (2d Cir. 1990) .. 19
EEOC v. Vermont, 904 F.2d 794 (2d Cir. 1990) 7
EEOC v. Wyoming, 460 U.S. 226 (1983) ..... *passim*
Erie R. Co. v. Tompkins, 304 U.S. 64 (1938) 14
FERC v. Mississippi, 456 U.S. 742 (1982) 13, 15
Garcia v. San Antonio Metro. Transit Authority, 469 U.S. 528 (1985) 15, 19, 20, 21
Griffin v. Oceanic Contractors, Inc., 458 U.S. 564 (1982) 9
Haggar Co. v. Helvering, 308 U.S. 389 (1940) 9
Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc., 452 U.S. 264 (1981) 16
In Re Stout, 521 Pa. 571, 559 A.2d 489 (1989) 19
Lane County v. Oregon, 74 U.S. (7 Wall.) 71 (1869) 15
Lorillard v. Pons, 434 U.S. 575 (1978) 5
Maryland v. Wirtz, 392 U.S. 183 (1968) 13, 14
Massachusetts Board of Retirement v. Murgia, 427 U.S. 307 (1976) 13
Morgan v. U.S., 113 U.S. 476 (1885) 14
NLRB v. Jones & Loughlin Steel Corp., 301 U.S. 1 (1937) 14
Oregon v. Mitchell, 400 U.S. 112 (1970) 13
Ramirez v. Puerto Rico Fire Service, 715 F.2d 694 (1st Cir. 1983) 13

TABLE OF AUTHORITIES—Continued

Page

Schlitz v. Virginia, 854 F.2d 43 (4th Cir. 1988) 19
South Carolina v. Baker, 485 U.S. 505 (1988) 15, 19, 20, 21
Texas v. White, 74 U.S. (7 Wall.) 700 (1869) 14
Taylor v. Beckman, 178 U.S. 548 (1900) 16
United Transp. Union v. Long Island R.R. Co., 455 U.S. 678 (1982) 16
Wilson v. North Carolina, 169 U.S. 586 (1898) 16
Younger v. Harris, 401 U.S. 37 (1971) 15

STATUTES AND CONSTITUTIONAL PROVISIONS

Age Discrimination in Employment Act, "ADEA," 29 U.S.C. § 621 *et seq.* (1982) ..... *passim*
29 U.S.C. § 621(a)(4) 12, 13
29 U.S.C. § 630(b) 12
29 U.S.C. § 630(f) ..... *passim*
29 U.S.C. § 630(g) 12, 13
29 U.S.C. § 630(h) 13
Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e) *et seq.* (1982) ..... *passim*
U.S. Const., Art. I, § 8 ..... *passim*
U.S. Const., Art. IV, § 4 ..... 14, 15, 16
U.S. Const., amend. X ..... *passim*
U.S. Const., amend. XIV ..... i, 13, 17
Mo. Const., art. II, § 1 12
Mo. Const., art. V, § 1 12
Mo. Const., art. V, § 23 17
Mo. Const., art. V, § 25 2
Mo. Const., art. V, § 26(1) 4

LEGISLATIVE HISTORY

118 Cong. Rec. 1837 (1972) 10
118 Cong. Rec. 1838 (1972) 10, 11, 18
118 Cong. Rec. 4095 (1972) 10
118 Cong. Rec. 4096 (1972) 10, 11, 18
118 Cong. Rec. 4483 (1972) 10, 18
118 Cong. Rec. 4485 (1972) 5
H. R. Rep. 93-913 (93d Cong., 2d Sess. (1974)), *reprinted in 1974 U.S. Code Cong. & Admin. News* 2811-2812 ..... 12, 13

TABLE OF AUTHORITIES—Continued

	Page
Joint Explanatory Statement of Managers at the Conference on H.R. 1746, 92d Cong., 1st Sess. 1972, *reprinted in* 1972 *U.S. Code Cong. & Admin. News* 2137	10, 18
MISCELLANEOUS	
Council of State Governments, *The Book of the States* (1990-91 ed.)	2
EEOC Opinion Letter to Rep. Claude Pepper, April 7, 1987, reprinted in EEOC Compliance Manual (BNA) at N:1001, n.2	4
Epstein, *The Power of Commerce*, 73 Va. L. Rev. 1387 (1987)	13
Merritt, *The Guarantee Clause and State Autonomy: Federalism For a Third Century*, 88 Colum. L. Rev. 1 (1988)	16, 20, 21
Monaghan, *Foreward: Constitutional Common Law*, 89 Harv. L. Rev. 1 (1975)	16
L. Tribe, *American Constitutional Law* (2d ed. 1988)	16
Van Alstyne, *The Second Death of Federalism*, 83 Mich. L. Rev. 1709 (1985)	20, 21

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INTEREST OF THE *AMICI CURIAE*

The *amici*, organizations whose members include state, county, and municipal governments and officials throughout the United States, have a strong interest in legal issues that affect state and local governments. This case presents questions concerning the lawfulness of a

provision of Missouri's Non-Partisan Court Plan. *See* Mo. Const., art. V, §§ 25-26. The case thus involves a potential area of federal interference with the carefully crafted scheme of judicial selection contained in the Missouri Constitution.

The specter of federal intrusion into a fundamental component of state government—here the tenure of members of the state judiciary—is obviously a matter of utmost importance to all of the States. Moreover, sixteen States have schemes of judicial selection which, like the Missouri Plan, involve initial appointment by the Governor followed by periodic retention elections. *See* Council of State Governments, *The Book of the States* 210-12 (1990-91 ed.).

Amici respectfully submit that the court of appeals correctly decided that Missouri judges are exempt from the application of ADEA and that the Missouri Plan does not otherwise contravene federal law. *Amici* further submit that a contrary holding would be irreconcilable with fundamental precepts of federalism, and submit this brief to assist the Court in its resolution of the case.[1]

SUMMARY OF ARGUMENT

1. Petitioners Ellis Gregory, Jr. and Anthony P. Nugent, Jr., two Missouri state court judges,[2] may lawfully be retired at the age of seventy years pursuant to Art. V, section 26(1) of the Missouri Constitution because they are exempt from the Age Discrimination in Employment Act ("ADEA") under § 630(f) of the Act. Section 630(f) exempts from ADEA's coverage, among other persons, "any person elected to public office in any

[1] The parties' letters of consent have been filed with the Clerk pursuant to Rule 37.3 of this Court.

[2] Petitioners were initially appointed by the Governor of the State of Missouri, and have since stood for retention by election pursuant to Article V, § 25 of the Missouri Constitution.

State" and "appointee[s] on the policymaking level" of state government. The plain language and legislative history of section 630(f) establish that petitioners are both "person[s] elected to public office" and "appointee[s] on the policymaking level". Each of these exemptions applies to petitioners, who retain their judicial positions as a result of a vote of the Missouri general electorate and who exercise broad discretion and powers of decisionmaking in the exercise of core governmental functions as Missouri judges.

2. The conclusion that section 630(f) applies to exempt petitioners, who are state judicial officials performing core state governmental functions, from coverage under ADEA is mandated by longstanding constitutional principles limiting Congress's power to dictate to the States the terms and conditions of employment of their highest ranking core governmental employees. Congress is constrained in its exercise of that power by constitutional principles of federalism as embodied in the structure of the Constitution, the Tenth Amendment, and the Guarantee Clause. Those principles, which underlie the exemptions set forth in section 630(f), prohibit Congress from using the commerce power to determine the identity of core state governmental officials by dictating to the States the terms of the tenure of members of the state judiciary.

ARGUMENT

I. PETITIONERS ARE EXEMPT FROM ADEA'S COVERAGE BECAUSE THEY ARE (A) PERSONS "ELECTED TO PUBLIC OFFICE" OF A STATE AND (B) "APPOINTEES ON THE POLICYMAKING LEVEL" WITHIN THE MEANING OF SECTION 630(f).

The language of section 630(f) and the pertinent legislative history establish that petitioners are exempt from coverage under ADEA and that, accordingly, they may lawfully be retired at the age of seventy years pursuant to Art. V, section 26(1) of the Missouri Constitution. Section 630(f) provides that a person is not an "employee," and is therefore exempt from ADEA's coverage, if he or she is "elected to public office in any State" or is "an appointee on the policymaking level." 29 U.S.C. § 630(f).

A. Petitioners Are Exempt From Coverage Under ADEA Because They Are Elected To A Public Office of the State of Missouri.[3]

Petitioners are exempt from coverage under the ADEA because they are "elected to public office". They hold their public offices after their first appointed term only by virtue of periodic retention elections in which the State's general electorate determines whether to retain them in public office. *See* Mo. Const., art. V, § 25. *See also EEOC Opinion Letter to Rep. Claude Pepper, April 7, 1987*, reprinted in EEOC Compliance Manual (BNA) at N:1001, n.2 (concluding that the "elected official" exemption of section 630(f) applies to state judges who are initially appointed and thereafter subject to periodic retention elections). Petitioners' strained argument that

[3] The determination of the court below not to address petitioners' status as elected officials, *see* Pet. App. 4-5, does not preclude this Court from deciding that petitioners are exempt from ADEA under the "elected to public office" exemption. *See, e.g., Arcadia, Ohio v. Ohio Power Co.*, 111 S. Ct. 415, 418 (1990).

the "elected to public office" exemption applies to persons initially elected to public office but not to officeholders who run in retention elections (Pet. Br. at 13-14) finds no support either in the common sense meaning of the statute's language or in its legislative history.[4] Indeed, the legislative history of section 630(f) establishes that one of the primary purposes of the "elected to public office" exemption was to prohibit federal government interference with the state electorate's selection of public officials. *See, e.g.*, 118 Cong. Rec. 4485 (1972).[5]

A determination that petitioners are not elected officials solely because they were not initially elected to public office would plainly be at odds with this purpose, for it would sanction federal government interference after the electorate had voted to return petitioners to their public office. A determination that Missouri judges such

[4] Section 630(f) was added to ADEA in 1974 as part of a series of amendments extending ADEA's coverage to the States. Pub. L. No. 93-259, § 28(a)(1), (2) (1974). At the time there was little or no debate regarding the meaning and purpose of section 630(f). The language of that section, however, was taken *verbatim* from section 2000e(f) of Title VII of the Civil Rights Act of 1964, which was added to Title VII in 1972 when Congress extended Title VII to the States. *See Lorillard v. Pons*, 434 U.S. 575, 584 (1978). The Congressional debates concerning section 2000e(f) are pertinent in determining the scope of section 630(f). *See id.*

[5] Senator Ervin, the chief proponent of the exemptions set forth in § 630(f), expressed the concern that without the statutory exemptions, it would appear that

> Congress now can pass a bill like this one, that says that a Federal judge can remove a Governor from office—this is not what it says expressly, but what it means—or other elected official of a State or county from office, if that Federal judge finds that the voters of that State elected that Governor because they preferred a man of his race or a man of his religion or a man of his national origin or a person of his sex, rather than a person of some other race or religion or national origin or sex.

118 Cong. Rec. 4485.

as petitioners are not elected officials and are therefore subject to the federal age discrimination laws would create significant pressure on the State of Missouri to abandon its carefully structured plan of initial appointment of judges followed by a popular election for retention in office. Petitioners' reading of the statute would force Missouri to choose between two parts of its constitution: the Missouri Plan and the mandatory retirement provision. If Missouri decided that the mandatory retirement provision served the greater purpose, then the State presumably would be forced to abandon the Missouri Plan and provide for initial election of all judges.

As the court of appeals recognized, nothing in the language or history of ADEA suggests that Congress intended this legislation to pressure the States to choose between an elected and an appointed judiciary. *See* Pet. App. 10-11. Under this Court's teachings, mere inference is an insufficient basis to attribute to Congress an intent to create a device so intrusive into a State's core governmental structure. *See Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 240, 242 (1985).

B. Petitioners Are Exempt From Coverage Under ADEA Because They Are Appointees On The Policymaking Level of Missouri's Government.

Petitioners are also exempt from ADEA coverage because they are "appointees on the policymaking level" within the meaning of section 630(f). The plain language of the statute, as well as the legislative history, demonstrate that the purpose of section 630(f) was to exempt from ADEA's coverage public officials at high levels in each of the three branches of state government.

Petitioners argue that section 630(f) merely excludes "policymakers" who work closely with top elected officials. *See* Pet. Br. 16-21.[6] This argument is erroneous.

[6] Petitioners urge this Court to adopt the untenably narrow interpretation of section 630(f) articulated by the Second Circuit in *EEOC v. Vermont*, 904 F.2d 794 (2d Cir. 1990). In that case, the court concluded that "Congress meant to deny ADEA protection only to such appointees as would normally work closely with and be accountable to the official who appointed them." *Id.* at 800. The court based this conclusion on the fact that the first and third categories of persons exempted under section 630(f), an elected official's personal staff and immediate advisors, are persons who would work closely with the elected official. The court inferred that the exemption for appointees on the policymaking level shared the characteristics of the first and third exemptions because Congress placed it between them. *Id.* at 798. For the reasons discussed in the text which follows, *amici* submit that this reading of the statute is strained and unpersuasive.

Congress did not limit the exemption simply to "policymakers"; rather, it exempted each "appointee on the policymaking level". 29 U.S.C. § 630(f). This statutory language clearly indicates that Congress intended to exempt a broad category of high level government officials. This exemption extends not only to "policymakers" in the narrow sense asserted by petitioners, but to all state officials who, like judges, exercise similarly important discretionary and decisionmaking powers in the performance of their core governmental duties.

The fact that judges do not work closely with the elected official who appoints them does not diminish their stature as "appointees on the policymaking level." The very nature of their office requires that judges act independently of the official who appoints them. Yet each state judge, as a separate and independent judicial officer, is at the top of his or her "chain of command". *See EEOC v. Massachusetts*, 858 F.2d 52, 56 (1st Cir. 1988). Judges engage in discretionary decisionmaking as do their counterparts in the executive and legislative branches. Neither the executive nor the legislative branches of Missouri's government attempt to set judicial policy. As recognized by the court below, it is the judges of the State who do so. *See* Pet. App. 7-8. *See also infra* at 12 & n. 11. They are the appointees on the policymaking level within their branch of government.

The plain text of section 630(f) undercuts petitioners' argument that Congress intended to exempt only appointees who work closely with the appointing official. *See* Pet. Br. at 21. Of the three appointee exemptions in section 630(f), two are directly aimed at the personal staff and immediate advisors of elected officials. If Congress had intended to exempt only persons who worked closely with the appointing official, it would have included only these two exemptions. Congress chose, however, to add an exemption for appointees on the policymaking level.

Moreover, petitioners incorrectly suggest that Congress intended section 630(f) to shield only members of the executive and legislative branches of government. Congress's placement of the appointee on the policymaking level exemption between exemptions for personal staff and immediate advisors of members of the executive and legislative branches of government does not support the conclusion that Congress intended the exemption to apply only to members of those two branches. As the court below held, *see* Pet. App. 9-10, there is neither a rational basis nor support in the legislative history for such grossly differential treatment of high officers of the three co-equal branches of state government. *See also EEOC v. Massachusetts*, 858 F.2d at 55.[7]

Identical treatment of high officers of all three branches of state government is especially important in view of the fact that many state judges—including many judges in Missouri—are elected *ab initio* and thus also exempt from ADEA under section 630(f). Petitioners' interpretation of section 630(f) leads to the absurd conclusion

[7] The practical effect of petitioners' arguments demonstrate their implausibility. Under the statutory scheme envisioned by petitioners, low-level employees in the legislative and executive branches, as well as law clerks and staff members of elected judges, would be exempt from the ADEA. An appointed state supreme court justice, however, would fall within the ADEA's ambit.

that Congress intended that ADEA apply to appointed state judges but not elected state judges, even when (as in Missouri) both groups of judges may occupy the same level of the State's judiciary. There is no legal basis for the conclusion that section 630(f) covers only two branches of a State's government, and some, but not all, equally situated members of the third branch. *See, e.g., Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982); *Haggar Co. v. Helvering*, 308 U.S. 389, 394 (1940).

Congress's intent in enacting section 630(f) must be assessed in light of the strong federalism concerns associated with congressional regulation of a State's judiciary, discussed *infra*. Both the court below and the First Circuit in *EEOC v. Massachusetts* indicated that because the tenure of state judges is of "exceeding importance" to each State, they would require a very clear statement of specific congressional intent to apply ADEA to appointed state judges before they would so interpret section 630(f). Pet. App. 3-4; 858 F.2d at 54-55. Neither court found a specific congressional intent to apply the ADEA to appointed state judges, and therefore each correctly concluded that appointed state judges are exempt from ADEA coverage.

The legislative history of section 630(f) fully supports the conclusion that Congress intended to exempt state judges from ADEA. When the extension of Title VII's coverage to the States was under consideration by Congress in 1972, Senator Ervin insisted that a new provision should be added to provide expressly that Title VII could not be used by federal authorities to dictate the qualifications of a State's core governmental officers. Accordingly, he proposed what ultimately became section 2000e(f) of Title VII and § 630(f) of the ADEA.[8]

[8] Senator Ervin's proposed amendment initially stated:

> Provided, however, that the term "employee" shall not include any person elected to public office in any State or political sub-

Senator Ervin's chief concern in proposing this section was that the federal courts and the EEOC might interpret the extension of Title VII to the States as a license to the federal government to dictate to the States, by imposing certain terms and conditions of employment, whom the States could select as their core governmental officers. *See* 118 Cong. Rec. at 1838, 4096, 4483.[9] Senator Ervin viewed such an intrusion as impermissible under the Constitution's guarantee of independent sovereignty to the States. *See, e.g.*, 118 Cong. Rec. 1837, 4096. *See also infra* at 17-18. Senator Ervin's concern was not limited, as petitioners claim, solely to elected officials and appointees in the executive and legislative branches of state government. To the contrary, Senator Ervin repeatedly reaffirmed his concern that the federal government might improperly seek to interfere with any of a state government's co-equal branches, including the judiciary. He specifically questioned Senator Taft whether:

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division of any State by the qualified voters thereof, or any person chosen by such officer to advise him in respect to the exercise of the constitutional or legal powers of his office.

118 Cong. Rec. 4095. The language concerning "appointee[s] on the policymaking level" was added in conference committee, after the floor debate and comments discussed in the text which follows. Joint Explanatory Statement of Managers at the Conference on H.R. 1746, 92d Cong., 1st Sess. 1972, *reprinted in* 1972 U.S. Code Cong. & Admin. News 2137, 2179-80.

[9] For example, Senator Ervin stated:

In other words, this would give the Federal courts jurisdiction to inquire as to what motive a Governor had in selecting men for his cabinet who would give him advice on his constitutional and legal duties, on [sic] if a Governor was actuated in any extent in the selection of an advisor or if the people were actuated in any extent in the election of a public official, so that the [Equal Employment Opportunity] Commission could come in and remove that public official from office and dictate who should be employed in his place.

118 Cong. Rec. 4096.

the bill in its present form would give Federal District courts the ultimate power to compel States and subdivisions of States to yield to their decrees with respect to the employment of persons who exercise the *legislative, executive, and judicial powers* of the States and political subdivisions of states?

118 Cong. Rec. 1838 (emphasis added).[10]

These repeated references to the States' judiciary are very significant. They demonstrate an overarching congressional intent to exclude from ADEA all state officers who perform core governmental functions, including state judges.

II. THIS COURT SHOULD CONSTRUE SECTION 630(f) OF ADEA TO ENCOMPASS PETITIONERS BECAUSE A CONTRARY INTERPRETATION WOULD SUBSTANTIALLY UNDERMINE IMPORTANT PRINCIPLES OF FEDERALISM WHICH LIMIT FEDERAL POWER TO DICTATE RULES FOR THE SELECTION AND RETENTION OF A STATE'S JUDICIARY.

The conclusion that section 630(f) exempts both elected and appointed state judges from ADEA's coverage is compelled by constitutional limitations on Congress's power to dictate rules for the selection and retention of a state's core governmental officers, including its judicial officers.

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[10] Senator Taft agreed that Title VII could not apply to elected state officers, and noted that it was probably necessary to exempt "those at the top decisionmaking levels in the executive and judicial branch as well." 118 Cong. Rec. 1838.

See also 118 Cong. Rec. 1838 (statement by Senator Ervin) ("If this were a constitutional enactment, then the Federal courts would be given jurisdiction to control the ultimate decision as to who is to be the Governor of a State or *the members of the Supreme Court of the State* or the legislators of the State.") (emphasis added); 118 Cong. Rec. 4096 (statement by Senator Ervin) ("the bill is broad enough in its present form to cover Governors of States, *State supreme court justices*, State legislators, and so forth") (emphasis added).

There is no doubt that petitioners are core governmental officers of the State of Missouri. Missouri, like the United States, has chosen a tripartite system of government composed of legislative, executive, and judicial branches. Missouri recognizes in its state constitution that the judiciary is a co-equal part of its sovereign government.[11] Petitioners and their colleagues on the Missouri bench embody the judicial power of the State and accordingly are an integral part of Missouri's core government, not merely "employees" of the State. *See, e.g., Bates v. State Bar of Arizona*, 433 U.S. 350 (1977) (State Supreme Court speaks as sovereign because it is the ultimate body wielding State's power over the practice of law).

Congress enacted ADEA pursuant to its power under the commerce clause. *See* 29 U.S.C. § 621(a)(4) (1982).[12] Congress's power under the commerce clause

[11] Article II, § 1 of the Missouri Constitution states that "[t]he powers of government shall be divided into three distinct departments—the legislative, executive and judicial—each of which shall be confined to a separate magistracy . . . ." Article V, § 1 provides that "[t]he judicial power of the state shall be vested in a supreme court, a court of appeals consisting of districts as prescribed by law, and circuit courts."

[12] Congress specifically provided, as the basis for its enactment of ADEA, the following:

> The Congress hereby finds and declares that—
>
> * * * *
>
> the existence of industries affecting commerce, of arbitrary discrimination in employment because of age, burdens commerce and the free flow of goods in commerce.

29 U.S.C. §§ 621(a)(4); 630(g), (h); H.R. Rep. 93-913 (93d Cong., 2d Sess. 1974) (1974 *U.S. Code Congress. & Admin. News* 2811-2812). *See also* 29 U.S.C. § 630(b) which defines "employer" in ADEA as limited to persons "engaged in an industry affecting commerce . . . ".

Some lower courts have concluded, in the context of determining a State's immunity from suit under the Eleventh Amendment, that Congress extended ADEA to the States pursuant to its authority

to regulate the tenure of office of a State's core governmental officers is limited by fundamental precepts of federalism.[13] These principles, which are inherent in the

under section 5 of the Fourteenth Amendment. *See, e.g., Ramirez v. Puerto Rico Fire Service*, 715 F.2d 694, 698 (1st Cir. 1983); *EEOC v. County of Calumet*, 686 F.2d 1249, 1253 (7th Cir. 1982). This Court, however, has left open the question of whether ADEA could be upheld as an exercise of Congress's powers under section 5. *See EEOC v. Wyoming*, 460 U.S. 226, 243 n.18 (1983). *Amici* submit that the plain text of ADEA, and the legislative history surrounding its enactment in 1967 and extension to the States in 1974, prove that Congress was acting pursuant only to its commerce power when it originally enacted and later amended that Act, *See* 29 U.S.C. §§ 621(a)(4); 630(g), (h); H.R. Rep. 93-913 (3d Cong., 2d Sess. 1974) (1974 *U.S. Code Congress. & Admin. News* 2811-2812). Petitioners have not argued to the contrary.

Even assuming that Congress intended to extend ADEA to the States pursuant section 5 of the Fourteenth Amendment, principles of federalism must still be taken into account since Congress is without power by itself to "constitutionalize" age as a suspect classification. Section 5 only authorizes legislation to "enforce" the provisions of the Fourteenth Amendment, and age is not a suspect classification included within the Equal Protection Clause. *See Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 313 (1976); *EEOC v. Wyoming*, 460 U.S. at 260-263 (Burger, C.J., dissenting). As explained by Justice Black in *Oregon v. Mitchell*, 400 U.S. 112 (1970):

> The Fourteenth Amendment was surely not intended to make every discrimination between groups of people a constitutional denial of equal protection. Nor was the Enforcement Clause of the Fourteenth Amendment intended to permit Congress to prohibit every discrimination between groups of people.

Id. at 127 (announcing the judgment of the Court in an opinion expressing his own views). None of these issues, of course, need be addressed in this case if the Court concludes that petitioners come within the language of the ADEA's exemptions, as argued above in Part I.

[13] Indeed, it can be argued that Congress does not possess plenary power under the commerce clause to regulate the tenure of a State's core governmental officers. *See FERC v. Mississippi*, 456 U.S. 742, 758-60 & n.23 (1982); *Maryland v. Wirtz*, 392 U.S. 183, 196-97 (1967); *see also* Epstein, *The Power of Commerce*, 73 Va. L. Rev. 1387, 1393-95 (1987). The Commerce Clause does not vest

structure of the Constitution and which are manifest in various substantive provisions such as the Tenth Amendment and the Guarantee Clause, have been recognized and applied by this Court and Congress since the founding of our nation. *See, e.g., EEOC v. Wyoming*, 460 U.S. at 265-275 (Powell, J., dissenting).[14] For example, in *Erie R. Co. v. Tompkins* this Court invoked these principles in concluding that a federal court sitting in diversity must apply the law of the State in which it sits:

> The Constitution of the United States . . . recognizes and preserves autonomy and independence in their judicial departments. . . . Any interference with either, except as thus permitted, is an invasion of the authority of the State and to that extent a denial of its independence.

304 U.S. 64, 78-79 (1938), *quoting with approval Baltimore & Co. v. Baugh*, 149 U.S. 368, 401 (1893) (Field, J., dissenting). *See also Texas v. White*, 74 U.S. (7 Wall.) 700, 725 (1869), *overruled on other grounds, Morgan v. U.S.*, 113 U.S. 476 (1885).[15] Similarly, this Court

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Congress with unchecked authority to regulate all aspects of a State's internal workings; rather, Congress is constrained to regulate that which is "commerce." A sovereign State's method of selecting its core governmental officials, including members of its judiciary, does not constitute "commerce" even under the broadest interpretation and application of that term. *See NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30 (1937) ("The authority of the federal government may not be pushed to such an extreme as to destroy the distinction, which the commerce clause itself establishes, between commerce 'among the several States' and the internal concerns of a State."). *See also Maryland v. Wirtz*, 392 U.S. at 197; *Coyle v. Oklahoma*, 221 U.S. 559, 565 (1911).

[14] *Amici* note that in their citations of the Court's cases concerning federalism they are not unmindful of the effect of later cases on previous rulings. For the sake of simplicity, however, not all such effects have been noted. *See, e.g.*, footnote 13, *supra* (citing *Maryland v. Wirtz*).

[15] As Chief Justice Chase observed in *Texas v. White*:

> [T]he preservation of the States, and the maintenance of their governments, are as much within the design and care of the

invoked principles of federalism to shield the judicial branch of state government from federal overreaching in *Younger v. Harris*, 401 U.S. 37 (1971), by ruling that a federal court could not enjoin an ongoing state court prosecution.

More recently, in *EEOC v. Wyoming*, this Court (in both its majority and dissenting opinions) reaffirmed the importance and vitality of constitutional principles of federalism in analyzing Congress's exercise of its powers under the commerce clause. The majority in that case, speaking through Justice Brennan, concluded that federalism principles embodied in the Tenth Amendment did not bar application of ADEA to a State's game wardens. The Court nevertheless emphasized that the Tenth Amendment guards against "undue federal interference in certain core state functions" and ensures the "unique benefits of a federal system in which States enjoy a 'separate and independent existence.'" 460 U.S. at 235, *quoting Lane County v. Oregon*, 74 U.S. (7 Wall.) 71, 76 (1869). The Court unequivocally stated that "some employment decisions are so clearly connected to the execution of underlying sovereign choices that they must be assimilated into them for purposes of the Tenth Amendment." *Id.* at 238 n.11. *See also Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 240, 242 (1985).

These principles, whether derived from the structure of the Constitution, the Tenth Amendment, or the Guarantee Clause,[16] ensure that the States shall retain their

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> Constitution as the preservation and maintenance of the National Government. The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States.

74 U.S. (7 Wall.) at 725.

[16] This Court has recently tended to ground its federalism analysis on Tenth Amendment principles. *See South Carolina v. Baker*, 485 U.S. 505 (1988); *Garcia v. San Antonio Metro. Transit Authority*, 469 U.S. 528 (1985); *EEOC v. Wyoming*, 460 U.S. 226; *FERC v.*

unique sovereignty and right to self-governance; they "protect[] the structure of state government from federal intrusion." L. Tribe, *American Constitutional Law* 396 (2d ed. 1988). Among other things, these principles of law prohibit the enactment of "federal laws that *restructure* the basic institutional design of the system a state's people choose for governing themselves." *See id.* at 397. One of the fundamental attributes of each State's system of self governance is the selection and tenure of core governmental officials. As this Court observ[ed] in *Taylor v. Beckman*, 178 U.S. 548 (1900):

> It is obviously essential to the independence of the States, and to their peace and tranquility, that their power to prescribe the qualifications of their own officers . . . should be exclusive, and free from external interference, except so far as plainly provided by the Constitution of the United States.

Id. at 570-71.[17]

Mississippi, 456 U.S. 742; *United Transp. Union v. Long Island R.R. Co.*, 455 U.S. 678 (1982); *Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264 (1981). Legal scholars have also anchored their analyses of constitutional considerations of state sovereignty in the Tenth Amendment or in the Guarantee Clause of Article IV, section 4. *See, e.g.*, Merritt, *The Guarantee Clause and State Autonomy: Federalism For a Third Century*, 88 Colum. L. Rev. 1 (1988) and authorities cited therein (arguing that the Guarantee Clause establishes the power of each state to "allocate power among the branches of state government" that lie at the heart of a republican form of government and to "set terms of office for state officials").

Both the Tenth Amendment and the Guarantee Clause plainly are important constitutional affirmations of federalism principles. Nonetheless, federalism—while perhaps "textual[ly] embodied" in the Tenth Amendment or Guarantee Clause—derives its essence from the constitutional scheme as a whole. *See* Monaghan, *Foreword: Constitutional Common Law*, 89 Harv. L. Rev. 1, 13 n.72 (1975).

[17] *See also Wilson v. North Carolina*, 169 U.S. 586, 594 (1898) ("In its internal administration[,] the State (so far as concerns the Federal Government) has entire freedom of choice as to the creation

A sovereign State such as Missouri has a substantial interest in maintaining the right of its citizens to determine the criteria for selection and tenure of members of its judiciary. Many rational goals are served by such criteria. For example, providing for retirement of judges at age seventy allows a greater number of qualified persons to participate in the judicial branch. Moreover, judges in Missouri are retained pursuant to elections for six to twelve year terms. *See* Mo. Const. art. V, § 23. The length of judicial terms thus decreases opportunities for removing a judge without resort to the public removal process of Missouri's Constitution. In these respects, among others, a State's interest in mandatory retirement of judges differs significantly from the application of similar criteria by private employers.[18]

In enacting section 2000e(f) of Title VII and later incorporating that section *verbatim* into ADEA as section 630(f), Congress was legislating against the backdrop of these constitutional principles of federalism and well-recognized interests and expectations of the States. Moreover, the legislative history of these sections reveals that Congress was not merely aware of these constitutional principles, but that Members specifically invoked these principles in support of statutory limitations such as section 630(f). As Senator Ervin explained in support of the amendment of Title VII to include the exemption provision,

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of an office for purely state purposes and of the terms upon which it shall be held.").

[18] Thus, as the court below found, Missouri's mandatory retirement provision is a rational method by which Missouri may serve its legitimate goal of maintaining a highly qualified and representative state judiciary. *See* Pet. App. at 13-16. For this reason, petitioners' argument that Missouri's mandatory retirement provision violates the equal protection clause of the Fourteenth Amendment is meritless. *See also EEOC v. Massachusetts*, 858 F.2d at 57-58.

> [C]ertainly one of the powers of government that was reserved to the States by the 10th amendment was the power of a state to select its own officers . . . because if the Federal judiciary could tell the State whom it can have for its officers and whom it can have for its employees, the federal judiciary becomes the real ruler of the people of the State and really, in the ultimate analysis, imposes its will upon the State and its people.

118 Cong. Rec. 4483. *See also id.* at 4096. Senator Ervin emphasized the dangers inherent in such federal intrusion into state government. "I know of no way in which Congress can more effectively destroy the States," he said, "than for Congress to vest in the Federal judiciary or in any other Federal department or agency, the power to select the officers and employees of the State and its political subdivisions." *Id.* at 4483. *See also id.* at 1838 (recognition by Senator Taft of the need for the definition of "employee" in section 2000e(f) to remain within "the constitutional limitations involved").

The final version of § 630(f) exempted a broad class of high-ranking state officials—those appointed at the policymaking level. The Joint Explanatory Statement observed that the purpose of the exemption is to ensure that Title VII (and later ADEA) was not applied to state officials with broad discretionary and decisionmaking power at the "highest level" of state government. 1972 U.S. Code Cong. & Admin. News 2179-80. In short, the Congressional purpose in enacting § 630(f) was to ensure that the federal courts and the EEOC, in interpreting and applying Title VII and ADEA, did not overstep the constitutional limitations on federal intervention in the workings of state government by dictating to the States rules for the selection and retention of their highest ranking officers, including the judiciary.

Consistent with these constitutional limitations, *amici* respectfully submit that this Court should interpret section 630(f) in a manner that effectuates Congress's recognition of the limits placed upon it by the principles of federalism. If Congress, under the guise of the commerce power, can dictate to the States terms for selection and retention of judges, there are no principled limits on Congress's power under the commerce clause to usurp the essence of a State's sovereignty. At a minimum this sovereignty encompasses the power "to choose—subject only to constitutional limits—who is to be part of the state's government." *EEOC v. Wyoming*, 460 U.S. at 253 (Burger, C.J., dissenting).[19]

Neither *Garcia v. San Antonio Metro. Transit Authority*, 469 U.S. 528 (1985), nor *South Carolina v. Baker*, 485 U.S. 505 (1988), compel a contrary conclusion. *Garcia* dealt with Congress's power to regulate the terms of employment of a municipality's transit employees and contains nothing to suggest that the reasoning or result in that case can be extended to a high state official such as a judge. *See* 469 U.S. at 554. Moreover, the *Garcia* Court stated that it "continue[s] to recognize that the

[19] Other courts have relied upon principles of federalism in holding that section 630(f) encompasses state judges. In addition to the court below, *see* Pet. App. at 4, these include *EEOC v. Massachusetts*, 858 F.2d at 54, *In Re Stout*, 521 Pa. 571, 559 A.2d 489 (1989), and *Apkin v. Treasurer & Receiver General*, 401 Mass. 427, 517 N.E.2d 141, 145 (1988).

These courts declined to hold that ADEA regulates the selection and retention of appointed state judges because that statute does not contain "a clear congressional mandate" in support of federal activity in this area already subject to state law. They held that such a mandate is required because the selection and retention of state judges—whether appointed or elected—"strike very close to the heart of state sovereignty." *EEOC v. Massachusetts*, 858 F.2d at 54. *Cf. EEOC v. New York*, 907 F.2d 316 (2d Cir. 1990) (because a State's sovereignty was directly implicated by the regulation of its elected judicial officials, it was proper to consider state law in construing 630(f)'s "elected to public office" exemption); *Schlitz v. Virginia*, 854 F.2d 43 (4th Cir. 1988) (state judge's ADEA claim, based on failure of legislature to reappoint him, held barred by legislative immunity doctrine).

States occupy a special and specific position in our constitutional system, and that the scope of Congress' authority under the Commerce Clause must reflect that position." *Id.* at 556. *See also id.* (declining to "identify or define what affirmative limits the constitutional structure might impose on federal action affecting the States under the Commerce Clause") (*citing Coyle v. Oklahoma*, 221 U.S. 559 (1911)).

Baker likewise provides no basis for holding that Congress can employ the commerce power to regulate a State's selection and retention of judges. In that case the Court held that a federal tax on state bearer bonds did not violate constitutional principles of federalism. *See* 485 U.S. at 515. This holding was predicated upon a factual finding by the Special Master that federal bond registration requirements would not affect the States' ability to raise debt capital. *Id.* at 529 (Rehnquist, C.J., concurring). *Garcia* and *Baker*—in stark contrast to petitioners in this case—did not call upon the Court to eviscerate core state sovereignty interests that rise to the level of the rules for the selection and retention of state judges.[20]

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[20] The majority opinion in *Baker* contains broad *dicta* that the Tenth Amendment and constitutional principles of federalism provide no substantive limitations on Congress's power under the Commerce Clause and that a State's only protection from congressional overreaching is through the political process. As Justices Rehnquist and Scalia observed, however, such an extreme position was unnecessary to resolve that case and was unwarranted by this Court's decision in *Garcia* in which it recognized the continued vitality of federalism principles and that those principles continued to provide affirmative limitations on the power of Congress under the commerce clause. *See* 485 U.S. at 528, 529. *See also Apkin*, 401 Mass. at 431-32, 517 N.E.2d at 143-44.

The proposition that federalism has no substantive content and that the political process is the only arena in which a State can seek to protect its sovereignty has been soundly criticized by a number of legal scholars. *See, e.g.*, Van Alstyne, *The Second Death of Federalism*, 83 Mich. L. Rev. 1709 (1985); Merritt, supra, 88 Colum. L. Rev. at 14-18. These commentators argue that States are not adequately protected by the federal political process because members of Congress, although coming from the States, become federal employees confronted with and surrounded by federal issues, different constituencies, and nationwide lobbying organizations whose purposes are often at odds with state sovereignty. *See, e.g.*, Merritt, *supra*, 88 Colum. L. Rev. at 15-17. These commentators further argue that there is no sound legal precedent for the Court to abandon, with respect to regulation under the commerce clause, its longstanding role and obligation "to oversee the Federal Government's compliance with its duty to respect the legitimate interests of the States." *See, e.g.*, Van Alstyne, *supra*, 83 Mich. L. Rev. at 1724. *See also Garcia*, 469 U.S. at 581 (O'Connor, J., dissenting); *Garcia*, 469 U.S. at 566-67 (Powell, J., dissenting).

Amici respectfully submit that to the extent this Court concludes that *dicta* in *Garcia* or *Baker* might permit the conclusion that Congress can dictate to the States the terms for selection and retention of core governmental officers, this Court should narrowly limit such *dicta* and foreclose that result.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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